No. 95-1635

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Supreme Court, U.S.
FILED
MAY 13 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

MINNESOTA COUNCIL OF DOG CLUBS AND AMERICAN DOG OWNERS ASSOCIATION, INC.,

Petitioners,

vs.

CITY OF MINNEAPOLIS, A MUNICIPAL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the Minnesota Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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17 pp

QUESTIONS PRESENTED

Are parties who prevail in a lawsuit seeking a declaratory judgment against a municipality that results in enjoining enforcement by the municipality of a state law of general applicability entitled to an award of attorney's fees under 42 U.S.C. § 1988(b) (Supp. V 1993) when the municipality was enforcing a state statute without modification, adoption, or change by the municipality.

Is a municipality that enforces a state statute without modification, adoption or change executing a municipal policy or custom that creates a cause of action under the Civil Rights Act of 1964, 42 U.S.C. § 1983 (1988) and liability for an award of attorney's fees under 42 U.S.C. § 1988(b) (Supp. V 1993).

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STATEMENT OF THE CASE

A. Omissions From The Petition

In the underlying lawsuit the Petitioners challenged various provisions of Minn. Stat. §§ 343.22 (1994), 343.235 (1994) and 343.29 (1994) (amended 1995). The Petitioners challenged Minnesota Statutes alone. The lawsuit was brought seeking declaratory judgment under the Minnesota Uniform Declaratory Judgment Act, Minn. Stat. §§ 555.01-.16. The Petitioners did not challenge any particular method of enforcement by the Respondent municipality. The Petitioners alleged no unconstitutional custom or policy of enforcement by the Respondent. The Petitioners did not bring suit against any employee of the Respondent in their individual or official capacities.

The Respondent enforced the state statutes, but did not modify them or incorporate them into municipal policy or procedure. The Petitioners did not challenge any policy or procedure specific to the Respondent. The Petitioners did not challenge any ordinance of the Respondent municipality.

Enforcement by the City of Minneapolis of the disputed statutory provisions was enjoined within the boundaries of the City of Minneapolis. The Order of the Trial Court did not prohibit enforcement by any agency other than the Respondent within the boundaries of the City of Minneapolis. The Order did not prohibit enforcement of the disputed statutory provisions at any other location within the State of Minnesota.

The Trial Court denied the Petitioner's request for attorney's fees. The Trial Court reasoned that the Petitioners were not complaining about conduct of the Respondent and the Petitioners had not claimed that any action of the Respondent City was in violation of the Civil Rights Act. Pet. App. 15.

The Minnesota Court of Appeals in affirming the Trial Court reasoned that a municipality must make a deliberate choice to follow a course of action from among various alternatives to sustain liability under 42 U.S.C. § 1983. Pet. App. 7; *Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W. 2d 903, 906, (Minn. Ct. App. 1995). The court concluded that the Respondent was not liable for attorney's fees for following state law.

REASONS FOR DENYING THE WRIT

I.

THE COURTS ARE NOT SPLIT ON THE PERMISSIBILITY OF AN AWARD OF ATTORNEY'S FEES AGAINST A MUNICIPALITY ENFORCING A STATE STATUTE OF GENERAL APPLICABILITY WITHOUT MODIFICATION.

The Petitioners have attempted to articulate a conflict among the courts when none exists. The Petitioners base their assertion of a conflict on the decisions in *Garner v. Memphis Police Dep't*, 8 F.3d 358 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1219 (1994); *Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989), *reh'g granted*, (April 14, 1989); and, *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980).

The Petitioners assert that these three cases are in conflict with the decision of the Minnesota Court of Appeals and the cases relied upon and cited by the Minnesota Court of Appeals.

The decisions in *Consumers Union*, *Garner* and *Jackson* do not conflict with the decision of the Minnesota Court of Appeals. The decisions examine issues different from those in the instant case. The decisions are consistent with the decision of the Minnesota Court of Appeals and with the cases cited therein.

The Minnesota Court of Appeals noted that the instant case was distinguishable from *Garner*. In *Garner*, the court rejected a police department's claim that it could not be held liable for a violation of the Civil Rights Act merely because the department took action consistent with state law. *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1219 (1994). The *Garner* court found liability when a police department adopted a more restrictive policy than state law required regarding the use of force in making an arrest. The court noted that

> to satisfy the *Monell* requirements a plaintiff must identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.

Id. at 364 (citations omitted). The plaintiff met the standard. The *Garner* court determined that the municipality's enforcement of the state law at issue was a deliberate choice among a variety of alternatives. The City of Memphis had a written policy incorporated in general orders. Unlike *Garner*, the Respondent City of Minneapolis did not exercise discretion is selecting among alternatives and made no choice among alternatives. *Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W. 2d 903, 906 (Minn. Ct. App. 1995).

In *Garner*, the Memphis police officers were following written municipal policies based upon state law. The municipal policies were consistent with state law, but existed as policies separate and distinct from state law. In the instant case, the Respondent followed state law without any municipal policy expanding, elaborating or adopting the statutory mandates of the state legislation.

The decisions in *Garner* and *Minn. Council of Dog Clubs* are consistent.

The Minnesota Court of Appeals also examined *Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989) and the facts in the instant case. *Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W. 2d 903, 906 (Minn. Ct. App. 1995). In *Jackson*, a Fifth Circuit case, a sheriff acting pursuant to a state statute was held to be acting under color of state law for purposes of a federal civil rights action regardless of whether state law provided him discretion in carrying out his duties. The sheriff was a state actor. *Jackson*, 868 F.2d at 167-68. The *Jackson* court awarded attorney fees against the sheriff, rejecting the argument that he should not be liable.

Unlike the instant case, *Jackson* addressed individual not municipality liability. Individual liability under § 1983 requires two elements (1) deprivation of a federal right and (2) action under color of law. *Gomez v. Toledo*, 446 U.S. 635, 641 (1980). Municipal liability requires that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658, 690 (1978).

In *Jackson*, the issue of municipal liability or municipal custom or policy was not presented to or examined by the court, therefore, the decision cannot be in conflict with that of the Minnesota Court of Appeals.

Petitioners final case, *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980), asserted as a basis for a conflict does not involve municipality liability and does not examine the municipal custom or policy standard of *Monell*.

Consumers Union examines the creation, adoption and promulgation of an unconstitutional policy. The defendant, the Supreme Court of Virginia, was absolutely immune from liability. This Court held "that is was an abuse of discretion to award fees" against the Supreme Court of Virginia. *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 738 (1980).

In dicta cited by the Petitioners, this Court indicated that attorney's fees may be awarded against the bar association as the enforcement agency for the unconstitutional regulations. The bar association is equated to an "enforcement official." This Court applied an individual liability analysis, rather than the custom or policy requirements necessary as a foundation for municipal liability.

The Petitioners attempt to articulate a conflict between *Garner* and *Jackson*, and *Bockes v. Fields*, 999 F.2d 788 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994), in the Fourth Circuit, and *Surplus Store and Exchange, Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991) in the Seventh Circuit. No conflict exists with *Garner* or *Jackson*.

In *Bockes*, a county board's firing of an individual did not provide the basis for § 1983 liability, because the board merely exercised discretion pursuant to policy established by a state board. "Such bounded, state-conferred discretion is not the 'policymaking authority' for which a county may be held responsible under § 1983." *Bockes*, 999 F.2d at 791. The plaintiff failed to establish a county policy. The county, unlike the Memphis police department in *Garner*, was not exercising choice among various alternatives. The actions of the county in *Bockes* were merely operational, not policymaking. The decision in *Bockes* in consistent with *Garner*.

Similarly, in *Surplus Store and Exchange, Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991), the plaintiff failed to establish a custom or policy on the part of the municipality separate and apart from a state statute. The mere fact that a municipality acted pursuant to state statute did not give rise to municipal liability. A municipal policy must consist of more than merely following state law. The court required a choice between alternatives.

There is no conflict among the circuits or between the circuit courts and Minnesota Court of Appeals. Municipal liability requires a custom or policy — a deliberate choice among alternatives. Enforcing a state statute without modification does not constitute a deliberate choice among alternatives. The cases cited by the Petitioners have applied identical criteria to different factual situations and, therefore, reached different conclusions. The cases are consistent in requiring a municipal custom or policy and a choice among alternatives.

II.

PETITIONERS STATE NO CAUSE OF ACTION ARISING UNDER 42 U.S.C. § 1983 AGAINST RESPONDENT.

The Petitioners' claim for attorney's fees is made pursuant to 42 U.S.C. § 1988 which authorizes the awarding of attorney's fees to the prevailing party in a cause of action arising under 42 U.S.C. § 1983. The Petitioners proved no cause of action arising under § 1983 and, therefore, cannot make a claim for fees under § 1988.

Prior to 1978, no municipal liability existed under 42 U.S.C. § 1983. *See Monroe v. Pape*, 365 U.S. 167 (1961). However, in

Monell v. Dep't of Social Servs. of the City of New York, 436 U.S. 658 (1978), liability under 42 U.S.C. § 1983 was extended to municipalities under limited circumstances. Municipal liability under § 1983 was imposed only where the municipality itself "causes" the constitutional violation. This Court reasoned that § 1983, as originally enacted, imposed liability only if a person "subjected, or caused to be subjected," another person to the deprivation of federally protected rights. *Id.* at 692. By specifically imposing liability for the torts of another person if one "caused" the tort to be committed, the statutory language suggests that Congress "did not intend § 1983 liability to attach where such causation was absent." *Id.* at 693. This Court concluded that it is only when the "execution of a government's policy or custom . . . inflicts the injury" that the municipality may be held liable under § 1983. *Id.* at 695.

This Court repeatedly has stressed the need to find a direct causal connection between municipal conduct and the constitutional deprivation. *See, e.g., City of Oklahoma v. Tuttle*, 471 U.S. 808, 824-825 n. 8 (1985), (requiring "affirmative link" between municipal policy and constitutional violation); and, *Polk County v. Dodson*, 454 U.S. 312 (1981), (municipal policy must be the "moving force" behind constitutional deprivation).

Municipalities may be held liable under § 1983 only when the action that is alleged to be unconstitutional implements or executes a municipal policy or custom. The Petitioners challenged no municipal policy or custom. The Petitioners challenged the enforcement of a state statute within the boundaries of the City of Minneapolis by the City of Minneapolis. When a party "failed to allege any policy that arguably violated his rights" he did not state a claim under § 1983. *Id.* at 326. In *Bockes*, the court noted that:

> In his complaints, [plaintiff] not only fails to point to a specific [municipal] policy or

> custom directly or casually linked to the alleged deprivation, but fails altogether to refer to any sort of [municipal] policy or custom linked in any way to the alleged deprivation.

Bockes v. Fields, 999 F.2d 788, 790 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 922 (1994).

In the instant case, no municipal ordinance, policy or custom implementing the state statute existed. Municipal enforcement of state law cannot under these circumstances give rise to § 1983 liability. It is only when the municipality adopts a policy different than that mandated by the state that § 1983 liability can be applied to the municipality. The municipality must make a deliberate choice among various alternatives. *Garner v. Memphis Police Department*, 8 F.3d 358 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1219 (1994).

The mere fact that a municipality acted pursuant to state statute does not give rise to municipal liability. A municipal policy must consist of more than merely following state law. In *Surplus Store & Exchange Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991), the court noted that

> [i]t is difficult to imagine a municipal policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the "policy" of enforcing state law. If the language and standards from *Monell* are not to become a dead letter, such a "policy" simply cannot be sufficient to ground liability against a municipality.

Id. at 791-92.

The argument that cities can be charged as a matter of policy with accepting state statutes that they do not ignore:

> would render meaningless the entire body of precedent from the Supreme Court and this court that requires culpability on the part of a municipality and/or its policymakers before the municipality can be held liable under § 1983, and would allow municipalities to be nothing more than convenient receptacles of liability for violations caused by state actors. . . .

Surplus Store and Exchange, Inc. v. City of Delphi, 928 F.2d 788, 791 n.4 (7th Cir. 1991). *See also Echos v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990) (local official enforcing state statue acting as state official, award of fees against state, not municipality, is proper).

The Petitioners assert that "liability arises because the City followed a policy of enforcing an unconstitutional state law." *Petition for Writ of Certiorari* at 8. This is the logic specifically rejected by the Court in *Surplus Store and Exchange, Inc. v. City of Delphi*. Additionally, no allegation has been made that the City of Minneapolis enforced the state statute after the declaration that the statute was unconstitutional.

A city prosecutor's actions under state criminal law are not attributable to municipal custom or policy. State criminal laws represent the policy of the state. Thus a city official pursues her duties as a state agent when enforcing state law or policy. *Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 2742 (1994).

The Petitioners alleged no constitutional violation by the City of Minneapolis. The Petitioners proved no constitutional violation by the City of Minneapolis. The Petitioners alleged no enforcement activity that could serve to create individual liability. It is clear that no cause of action existed under 42 U.S.C. § 1983 against the City of Minneapolis, therefore, any claim for attorney's fees based upon 42 U.S.C. § 1988 must fail.

III.

PUBLIC POLICY SUPPORTS A DENIAL OF ATTORNEY'S FEES.

Significant and overriding public policy concerns support the decision of the court below. Municipalities should not be held liable every time they enforce a state law. Allowing attorney's fees to be awarded against a municipality would lead to chaotic and haphazard enforcement of laws of general applicability.

In order to protect itself from liability, a municipality would have to examine every state statute and then decide whether or not to enforce it. This would produce a spotty and chaotic enforcement policy throughout a state.

As noted:

> If every time the courts declared a law unconstitutional, every municipality, every governmental entity in the state with law enforcement powers that had attempted to enforce what they thought to be good law could be sued, the end result is clear. Legislatures would pass no laws; if they did, municipalities would not enforce them.

Minn. Council of Dog Clubs v. City of Minneapolis, 540 N.W. 2d 903, 907, (Minn. Ct. App. 1995) (Randall, J., concurring specially).

The Petitioners public policy concerns are misplaced. The decision of the Minnesota Court of Appeals did not limit the award of attorney's fees when a plaintiff proves a constitutional violation by a municipality. The Minnesota Court of Appeals did not limit attorney's fees when a statute is being enforced against a plaintiff by a named defendant.

The Petitioners' cause of action was brought pursuant to the Uniform Declaratory Judgment Act, Minn. Stat. §§ 555.01-.16, which provides authority to challenge the constitutionality of statutes independent of 42 U.S.C. § 1983. The only reference in the Complaint of the Petitioners to 42 U.S.C § 1983 relates to the definition of "under color of state law." The Petitioners asserted no municipal policy or custom. The court below noted that "Appellants sought a ruling under the Uniform Declaratory Judgements Act, Minn. Stat. § 555.01-.16 (1992) that certain provisions of the Cruelty to Animals Act violate the privileges of due process and the right to a fair trial as guaranteed the United States and Minnesota Constitutions." *Minnesota Council of Dog Clubs v. City of Minneapolis*, No. C3-94-939, 1994 WL 593912 at *2 (Minn. Ct. App. Nov. 1, 1994). Pet. App. 20-21.

Throughout litigation, the Petitioners have asserted causes of action challenging the constitutionality of Minnesota Statutes solely upon the authority of the Uniform Declaratory Judgment Act. The Petitioners first attempt to frame a cause of action pursuant to § 1983 arose with their request for attorney's fees. Allowing attorney's fees to be awarded when no cause of action was asserted or proved under 42 U.S.C. § 1983 would be against public policy.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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